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218-502—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1245

MASTRO PLASTICS CORPORATION AND FRENCH AMERICAN REEDS MANUFACTURING COMPANY, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 42–59) is reported at 354 F. 2d 170. The Board's Supplemental Decisions and Orders (R. 6a–134a, 135a–152a)[1] are reported at 136 NLRB 1342 and 145 NLRB 1710.

JURISDICTION

The Supplemental Decree of the court of appeals (Pet. 37–41) was entered on January 5, 1966. On March 29, 1966, Mr. Justice Harlan extended the time in which to file a petition for a writ of certiorari to

[1] "R." refers to the appendix to petitioners' brief in the court below.

and including April 25, 1966, and the petition was filed on April 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a proceeding to assess the amounts of back pay due employees against whom the employer has discriminated in violation of the National Labor Relations Act, the burden of producing evidence showing whether or not jobs would have been available to particular employees during the relevant period rests upon the employer or the Board.

2. Whether the Board properly awarded back pay for the period prior to the decision of this Court in *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270 (1956), which sustained the Board's finding of unlawful discrimination.

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Administrative Procedure Act (5 U.S.C .1001, *et seq.*) are set forth at pp. 4–7 of the petition. The relevant portions of the National Labor Relations Board Rules and Regulations are set forth in the Appendix, *infra*, pp. 12–14.

STATEMENT

On March 13, 1953, the Board issued a Decision and Order (103 NLRB 511), finding that petitioners ("the Company") had discriminatorily discharged employee Frank Ciccone and had unlawfully refused to reinstate 76 other employees who had struck over the un-

fair labor practice against Ciccone. The Board ordered the Company to offer Ciccone and the striking employees "full reinstatement to their former or substantially equivalent positions" and to make them whole "for any loss of pay they may have suffered by reason of the [Company's] discrimination against them" (103 NLRB at 519–520). The court of appeals enforced the Board's order (214 F. 2d 462), and this Court affirmed. 350 U.S. 270 (Pet. 60–86).

After the Company offered reinstatement to all of the employees against whom discrimination had been practiced, efforts were made to negotiate the back pay question informally (R. 6a–7a, 24a–25a). These efforts proved unsuccessful, and, on June 14, 1960, the Board's Regional Director issued a back pay specification as provided in the Board's regulations.[2] This detailed specification (see R. 153a–158a, 22a), which was over 150 pages in length,[3] computed the weekly gross back pay due each employee for each week of the back pay period by multiplying the average hours worked during each week by persons actually employed in the plant at that time (the incumbent employees) by the hourly wage rate in effect at the outset of the discrimination for each employee claim-

[2] See Secs. 102.52–59 of the Board's Rules and Regulations, set forth in the Appendix, *infra*, pp. 12–14.

[3] For most of the employees, the back pay period extended from March 12, 1951 (the Monday following the date, March 9, when the Company refused the strikers' unconditional application to return to work), to March 9, 1956 (when the Company offered reinstatement). 103 NLRB 511, 555, 563. Two of the strikers, however, were not offered reinstatement until later (R. 24a–25a).

ing back pay, adjusted for hourly rate increases that occurred thereafter. For the two weeks in the summer when the plant was substantially shut down, vacation pay was computed in accordance with the method by which vacation pay was computed for incumbent employees. The weekly figures were cumulated and, in addition, year-end bonuses were computed in accordance with the method by which such bonuses was paid to incumbent employees. From the gross back pay thus computed, the known interim earnings of each employee from other employment, less the expenses incurred in seeking such employment, were deducted. (R. 25a–26a, 153a–157a.)

The back pay specification was served on the Company, which filed an answer challenging its legal sufficiency, and the case proceeded to hearing before a Trial Examiner.[4] At the hearing, the Board's General Counsel placed the back pay specification in evidence. He then called as a witness each available employee as to whom discrimination had been found. These employees testified to the efforts made to seek other employment during the back pay period and the amount of earnings from such employment. The Company cross-examined the employees (R. 26a-27a). At the close of the General Counsel's case, the Company moved to dismiss the complaint on the ground that, since the General Counsel had failed to show

[4] The Trial Examiner found that the Company's amended answer, for the most part, admitted the accuracy of the mathematical calculations in the Board's specification, but challenged, *inter alia*, the assumption that jobs were available at all times during the back pay period for each employee who claimed back pay (R. 26a).

affirmatively that jobs at the plant would have been available for each employee during the back pay period, he had not established a *prima facie* case. The Trial Examiner overruled the motion, holding that it was for the Company to prove that jobs would have been unavailable for particular employees, if that was the fact. The Company rested on its motion and declined to adduce any evidence that jobs would, in fact, have been unavailable (R. 27a–28a).

The Trial Examiner concluded that 62 of the employees were entitled to back pay awards, ranging from $4.36 to $10,096.97. He further recommended that the back pay claimed in the Board's specification for 9 employees who did not testify be placed in escrow until they came forward and appeared at a second hearing[5] (R. 125a–128a). The Board adopted the findings and recommendations of the Trial Examiner with minor alterations. The Board also adopted the Trial Examiner's recommendation that the 9 awards be placed in escrow (R. 6a–22a).

In July, 1963, an additional hearing was held at which depositions for 7 of the 9 employees who had not appeared at the first hearing were placed in evidence. The Trial Examiner granted back pay to 8 of the 9 employees, including one who did not testify or submit a deposition (Isiah Smith) (R. 139a–151a). The Board adopted, again with minor alterations, the Trial Examiner's second decision (R. 135a–138a).

The Company petitioned the court of appeals to

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[5] The Trial Examiner listed 8 employees who had not testified, but the Board found that he had inadvertently omitted Michael Valentine (R. 13a, n. 14).

review the Board's back pay orders. The court enforced the Board's orders in full, except for the back pay award to Isiah Smith (Pet. 42–59).* The orders as enforced provide for a total payment of $153,609, to 69 claimants (Pet. 39–41).

ARGUMENT

1. Section 10(c) of the Act empowers the Board to award back pay to employees who have been the victims of discrimination. "The employee is entitled to receive what he would have earned normally during the period of the discrimination against him, less what he actually earned in other employment during that period." *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F. 2d 447, 452 (C.A. 8). In determining what an employee would normally have earned, a relevant factor is whether the employer would have had work available for him had the discrimination not occurred. The principal question presented by the petition in this case is whether the General Counsel or the employer has the burden of producing evidence relating to such job availability when that factor is in dispute.

The Board's position, sustained by the court of appeals, is that, when the employer raises the issue of the existence of jobs during the back pay period, the burden of producing evidence that a job would have been unavailable for any particular employee rests upon the employer. In the absence of such evidence,

* The court held that, since Smith had not appeared at the hearing and no unusual circumstances were shown to justify his failure to appear, the Board had failed in its duty of producing evidence with respect to his claim (Pet. 53).

the Board holds that it may assume that each of the employees claiming back pay would have worked during each week of the back pay period for the average number of hours actually worked by incumbent employees during that period. The Company, on the other hand, contends that the burden of establishing job availability for each employee is on the General Counsel who must show, as to each employee claiming back pay, the identity of the replacement of that employee (if, in fact, he was replaced), and the actual earnings of that replacement (Pet. 18–19). In the absence of such affirmative evidence for each employee, the Company contends that no back pay whatsoever may be awarded.

The court of appeals was clearly correct in sustaining the Board's view, which appropriately allocates the burden of producing evidence on the various relevant issues in a back pay dispute. As the court pointed out (Pet. 49), "[t]o establish that an employer has reduced or adjusted his business to an extent eliminating the job of a discriminatee requires careful analysis of the books and records of the employer during the back pay period. Of course, the Board has access to these records, but it is the employer who kept the records and who therefore is able to explain them and to interpret any ambiguities they may contain." Nor does the Company suggest any impracticability or unfairness in thus allocating the burden to it, rather than to the Board. The Board's rule, which assumes that claiming employees would normally have worked the same number of hours as the average time worked by incumbent employees if the

contrary does not appear, is reasonable and has been consistently approved by the courts of appeals. See, *e.g., National Labor Relations Board* v. *Kartarik, Inc.*, 227 F. 2d 190, 193 (C.A. 8); *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F. 2d 447, 452–453 (C.A. 8); *Nabors* v. *National Labor Relations Board*, 323 F. 2d 686, 690 (C.A. 5), certiorari denied, 376 U.S. 911; *National Labor Relations Board* v. *Charley Toppino & Sons*, 61 LRRM 2655, 2656–2657 (C.A. 5), March 24 1966; *National Labor Relations Board* v. *Ellis and Watts Products*, 344 F. 2d 67, 69 (C.A. 6).[7]

The Company contends that the Board's view leads to incongruous results by positing the following example (Pet. 18–19): It is assumed that there were 77 strikers, but that only 10 employees actually worked during a given week for a total of 400 hours, or an average of 40 hours per week for each man. In such a case, the Board's formula would claim back pay for 3,080 hours (77 multiplied by 40) notwithstanding that there were only 400 hours of actual work. The example given is, of course, an unreal one. There is no indication in the record that, in any of the quarters for which the Board computed

[7] Nor would it be correct automatically to deduct any job reductions during the back pay period—even if such reductions were shown—from the back pay due. Because of seniority, or other reasons, employees claiming back pay might well have been retained in preference to other employees, even though job reductions were effectuated. To reduce the back pay due, it must be shown that the particular employees claiming back pay would not have been employed had the discrimination not occurred.

back pay, there was such a great disparity between the number of employees claiming back pay and the number of employees who actually worked. However, if there had been such disparity between the Board's computation and the actual situation, the Company was entirely free under the Board's rule to establish that its operations had in fact declined during that period and that, had there been no discrimination, some or all of the employees claiming back pay would have been unemployed. If such a showing had been made, the Company would have been able to reduce the amount of back pay liability. See *W. C. Nabors,* 134 NLRB 1078, 1087–1091.

Finally, the Board's back pay formula is not contrary to Section 7(c) of the Administrative Procedure Act (5 U.S.C. 1006(c)). That section provides: "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." As the court of appeals correctly observed (Pet. 48), Section 7(c) was not intended "to disturb the traditional allocation of the burden of going forward between the parties to an adjudicative proceeding." It is therefore wholly consistent with Section 7(c) to say that the Company had the burden of alleging and proving affirmative defenses to the General Counsel's claim. The question is whether job unavailability was, in fact, an affirmative defense and, for the reasons set forth above, the Board and the court of appeals properly concluded that it was.[8]

[8] Nor is the decision below in conflict with *Wirtz* v. *Baldor Electric Co.*, 48 Labor Cases ¶ 31,518, 50 Labor Cases ¶ 31,603 (C.A.D.C.) (Pet. 26). There the Secretary of Labor sought

2. There is no inconsistency (see Pet. 28–30) between the holding of the court of appeals that, although the Company has the burden of producing evidence relating to job unavailability, the Board must, where its interim earnings figures are challenged, make the employees available so that they may testify and be cross-examined on the question of willful idleness. As the court below stated (Pet. 50), since "the Board presumably has some prior contact with available discriminatees when it computes 'net back pay due' for its specification, * * * it is more likely to know their whereabouts at the time of the hearing" and thus it is "fair to require that the Board make them available." Thus, similar considerations of appropriateness and fairness motivated both allocations of the burden—albeit to different parties.

3. The Company's remaining contention (Pet. 30–37) is that, since the literal terms of Section 8(d) of the Act appeared to privilege its action in discharging the strikers, it was unconstitutional to award back pay for the period between between the date of the discrimination (March, 1951) and the decision in *Mastro Plastics Corp.* v. *National Labor Relations*

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to justify certain minimum wages he had established under the Walsh-Healey Act (41 U.S.C. 35–45) on the basis of a wage survey made by the Bureau of Labor Statistics. The court held that the Secretary could not sustain his burden without revealing the names of the companies covered by the survey. No similar problem is presented here, for the Board has fully disclosed to the Company, in the back pay specification and through testimony at the hearing, all of the factors involved in the back pay computation.

Board, 350 U.S. 270 (February, 1956), where this Court held that the Company's action was, in fact, unlawful.[9] The court of appeals properly characterized this as a "frivolous contention." As the court stated (Pet. 44, n. 1), even "assuming § 8(d) is ambiguous, it is not unconstitutionally vague, and there is no policy against imposing 'retroactive' compensatory liability when a violation of a valid statutory duty causes economic injury to persons within the protective scope of the statute."

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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MAY 1966.

[9] The employees in the instant case went out on strike before expiration of the sixty-day period specified in Section 8(d) (Pet. 4–5). That section provides that any employee who does so "shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purpose of sections 8, 9, and 10 of [the] Act." This Court sustained the Board's view that the loss of status provision does not apply where, as here, the strike was provoked by serious unfair labor practices on the part of the employer (Pet. 60–86).

APPENDIX

The relevant portions of the National Labor Relations Board Rules and Regulations, Series 8 as amended, 29 CFR 102.52, *et seq.*, are as follows:

SEC. 102.52 *Initiation of proceedings; issuance of back-pay specification; issuance of notice of hearing without back-pay specification.*— After the entry of a Board order directing the payment of back pay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of back pay due which cannot be resolved without a formal proceeding, the regional director may issue and serve upon all parties a back-pay specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 15 days after the service of the specification. * * *

SEC. 102.53 *Contents of back-pay specification and of notice of hearing without specification.* (a) *Contents of back-pay specification.* Where the specification procedure is used, the specification shall specifically and in detail show, for each employee, the back-pay periods broken down by calendar quarters, and specific figures and basis of computation as to gross back pay and interim earnings, the expenses for each quarter, the net back pay due, and any other pertinent information.

* * * * *

SEC. 102.54 *Answer to specification; no requirement for answer to notice of hearing issued without back-pay specification.*

(a) *Filing and service of answer to specification.* The respondent shall, within 15 days

from the service of the specification, if any, file an answer thereto; an original and four copies shall be filed with the regional director issuing the specification, and a copy thereof shall immediately be served on any other respondent jointly liable.

(b) *Contents of the answer to specification.* The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross back pay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to the specification.* If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be

true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

* * * * *

SEC. 102.55 *Extension of time for filing answer to specification.*—Upon his motion or upon proper cause shown by any respondent, the regional director issuing the specification may by written order extend the time within which the answer to the specification shall be filed.

SEC. 102.56 *Extension of date of hearing.*—Upon his own motion or upon proper cause shown, the regional director issuing the specification or notice of hearing without specification may extend the date of hearing.

* * * * *

SEC. 102.58 *Withdrawal.*—Any such specification or notice of hearing without specification may be withdrawn before the hearing by the regional director on his own motion.

SEC. 102.59 *Hearing; posthearing procedure.*—After the issuance of a notice of hearing with or without back-pay specification, the procedures provided in sections 102.24 to 102.51, shall be followed insofar as applicable.

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